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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1531

ASSOCIATED MILK PRODUCERS, INC., *Petitioner*

v.

UNITED STATES, *et al.*, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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ARGUMENT

Associated Milk Producers, Inc. ("AMPI") respectfully submits this Reply Brief in order to correct several false impressions created by the Opposition Briefs filed by the Government and the National Farmers' Organization ("NFO"). At issue in this proceeding is the Fifth Circuit's decision which, through an unjustifiably restrictive reading of this Court's decisions interpreting the final judgment rule, effectively denies AMPI any opportunity to obtain appellate review of (1) its allegations that a grand jury investigation of AMPI was conducted without proper authority and for

impermissible purposes, and (2) of orders issued by Chief Judge Spears of the United States District Court for the Western District of Texas denying relief against the alleged grand jury improprieties, transferring materials developed by this grand jury to another jurisdiction for possible use by private plaintiffs in an independent antitrust proceeding and granting one of the private plaintiffs intervention in the now-completed transfer proceeding. The failure to allow AMPI an opportunity to obtain appellate review of these issues and orders at this time will cause AMPI irreparable injury, will undermine the grand jury institution as a check on prosecutorial overzealousness, and will result in a breach of grand jury secrecy without the requisite Fed. R. Crim. P. 6(e) showing. Thus, the characterization of the October 1 transfer order as "merely a mechanical step" (Gov't. Brief at 5) or a " 'housekeeping' order" (NFO Brief at 2), and the attempt by both the Government and NFO to credit the other orders in issue with even less importance, constitutes a serious misrepresentation of what is at stake in this case. Likewise, the attempt in the Opposition Briefs to downplay the serious conflicts between the decision below and prior decisions by this Court and various Courts of Appeals will not withstand a close scrutiny.[1]

[1] NFO's Statement of the Case is also misleading in at least one respect. The allegation that AMPI destroyed or concealed documents totally ignores the question of whether these documents were material, whether they were the subject of any discovery request and whether AMPI was under any obligation to produce these documents. In fact, AMPI has never admitted that material documents were destroyed or concealed. Moreover, some of the documents which NFO alleges were removed were the subject of prior notice that they would not be produced, and many of the documents in issue were never the subject of a discovery request.

NFO's reliance on the testimony of David Parr before the Senate Watergate Committee is totally improper since an examination of the transcript shows that Mr. Parr was attempting to exculpate himself from charges of making illegal political contributions and, in fact, the prosecutor admonished Mr. Parr not to try so hard to please the prosecutor. *See* Watergate and Related Activities, Milk Fund Investigation: Executive Session Hearings Before the Select Committee on Presidential Campaign Activities of the United States Senate, 93d Cong., 1st Sess. 6851 (1973). AMPI has contended that Mr. Parr's testimony was false.

As NFO's Opposition Brief indicates, to date there has been no finding that AMPI destroyed or concealed documents required to be produced during discovery.

I. The Decision Below Violates This Court's Rule Of Practical Finality Because It Deprives AMPI Of All Opportunity To Obtain Appellate Review Of The Orders In Issue

The Opposition Briefs, like the decision below, are premised on the faulty assumption that either Chief Judge Oliver of the Western District of Missouri or the Eighth Circuit will have a future opportunity to rule on the issues raised by AMPI and grant an appropriate remedy if AMPI prevails on these issues. AMPI's contentions that the grand jury was improperly authorized and was used for impermissible purposes can only be considered by the court responsible for supervising the grand jury, and only that court has the power to order expungement of the transcript and return of AMPI's documents. *See State of Illinois* v. *Sarbaugh,* 552 F.2d 768, 772-73 (7th Cir.), *cert. denied,* 98 S. Ct. 262 (1977); *United States* v. *Doe,* 455 F.2d 1270, 1274 (1st Cir. 1972); *Gibson* v. *United States,* 403 F.2d 166, 167 (D.C. Cir. 1968). Regarding the transfer order, only the court which supervised the grand jury investigation is in a position to evaluate the need for continued secrecy and has jurisdiction to make the required Fed.R.Crim.P. 6(e) determination.[2] *See Petrol Stops Northwest* v. *United States,* 571 F.2d 1127, 1130 n.4 (9th Cir.), *cert. petition*

As NFO's Opposition Brief indicates, to date there has been no finding that AMPI destroyed or concealed documents required to be produced during discovery.

[2] In fact, Chief Judge Spears ruled that the requisite Rule 6(e) showing had *not* been made. (Pet. App. 22a, 33a.)

filed, No. 77-1547 (April 28, 1978); *State of Illinois* v. *Sarbaugh,* 552 F.2d 768, 772-73 (7th Cir.), *cert. denied,* 98 S. Ct. 262 (1977). In *Herman Schwabe, Inc.* v. *United States Machinery Corp.,* 21 F.R.D. 233, 235 (D.D.C. 1957), the court stated:

> Obviously, the Court that has jurisdiction over the grand jury is in a better position to determine whether there should be a disclosure of the grand jury minutes than any other Court. It might lead to conflicts and possibly to chaos if any one of the ninety or more United States District Courts could direct the disclosure of the minutes of a grand jury sitting in any other District. . . .
>
> The Court is of the opinion that Rule 6(e) should be construed as meaning that only the Court that has jurisdiction over the grand jury may direct or permit a disclosure of the grand jury minutes.

Since Chief Judge Oliver and the Eighth Circuit are powerless to consider the legitimacy of the authority and the purpose of the grand jury investigation, the Fifth Circuit's decision has the practical effect of forever denying AMPI an opportunity to obtain appellate review of the serious issues presented, and thus that decision is a clear departure from this Court's holding in *Cohen* v. *Beneficial Industrial Loan Co.,* 337 U.S. 541, 546 (1949), and subsequent cases, that the final judgment rule is to be given a "practical rather than a technical construction." While the decision below and the Opposition Briefs pay lip service to these Court decisions, the assertion that Chief Judge Spears' Orders are not final is a clear departure from the rule of practical finality first established in *Cohen.*

II. The October 1, 1976 Order Transferring Grand Jury Materials For Use In An Independent Proceeding In Another Jurisdiction Is Final And Appealable Under 28 U.S.C. § 1291

The October 1, 1976 Order is a final appealable order under 28 U.S.C. § 1291 because it terminates an independent proceeding brought by the Government for the sole purpose of transferring grand jury materials to another jurisdiction for use in private antitrust litigation and because the failure to permit an appeal on the merits at this time will permanently deny AMPI an opportunity to obtain appellate review of and meaningful relief for the serious abuses of the grand jury process evident in this case.

The closest analogy to the instant proceeding is *State of Illinois* v. *Sarbaugh,* 552 F.2d 768 (7th Cir.), *cert. denied,* 98 S. Ct. 262 (1977), which held that an order denying discovery but transferring grand jury materials to another jurisdiction for possible use by the private plaintiff in an independent antitrust proceeding was a final appealable order. NFO's attempt to distinguish *Sarbaugh* and *Gibson* v. *United States,* 403 F.2d 166 (D.C. Cir. 1968), on the ground that the district court orders in these cases *denied* disclosure is a chimera. In *Sarbaugh, as in the instant proceeding,* the district court which had supervised the grand jury ruled that the requisite particularized showing of compelling need for disclosure under Rule 6(e) had not been made, but nevertheless ordered transfer. In other cases, district court orders making grand jury materials available for use in independent proceedings in other districts to whatever extent the second court will permit, have been considered final and appealable. *Petrol Stops Northwest* v. *United States,* 571 F.2d 1127 (9th Cir.), *cert. petition filed,* No. 77-1547 (April 28, 1978); *United States* v. *Byoir,* 147 F.2d 336 (5th Cir. 1945). The two Second Circuit decisions relied

upon in the Opposition Briefs, if they have any persuasive value at all,[3] only further demonstrate the serious dispute among the Circuits which requires a resolution by this Court.

The Government asserts that the October 1 order is not final because initially it merely transfers grand jury materials to Chief Judge Oliver for his *in camera* inspection and that AMPI will have another opportunity before Chief Judge Oliver to challenge the disclosure of these materials to the private plaintiffs. This argument loses all persuasiveness in view of the fact that AMPI's primary contention is that the grand jury investigation was conducted without legal authority and for improper purposes, and therefore dis-

[3] Baker v. United States Steel Corp., 492 F.2d 1074 (2d Cir. 1974), although having some factual similarities to the instant proceeding, is of questionable precedential value in light of Judge Lumbard's vigorous dissent, 492 F.2d at 1080, and the *Sarbaugh* court's refusal to align itself with the *Baker* majority, 552 F.2d 768, 774 n.7 (7th Cir.), *cert. denied*, 98 S. Ct. 262 (1977). Atlantic City Elec. Co. v. A. B. Chance Co., 313 F.2d 431 (2d Cir. 1963), is distinguishable (1) because it involved an order in the midst of the taking of discovery for access to grand jury materials already before the court supervising the discovery rather than an order terminating an independent transfer proceeding, and (2) because it involved an application for leave to appeal this order under 28 U.S.C. § 1292(b). The issue of the finality of an order terminating an independent transfer or discovery proceeding under 28 U.S.C. § 1291 was never presented to or considered by the court. This case must also be considered in light of the extraordinary circumstances of the Electrical Equipment Cases and the highly unusual procedures which had to be utilized by the courts to effectively deal with the situation. These procedures included the defendants' stipulation that document production could be made by disclosing documents previously produced to a federal grand jury and procedures whereby grand jury transcripts of specific witnesses could be made available to courts supervising depositions, and, if necessary, to the parties for use in these depositions. *See generally* Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 211 F.Supp. 729 (N.D. Ill. 1962); City of Philadelphia v. Westinghouse Elec. Co., 210 F.Supp. 486 (E.D. Pa. 1962).

closure to anyone, including Chief Judge Oliver, would be improper. *See Ealy* v. *Littlejohn,* 569 F.2d 219, 234 (5th Cir. 1978) (injunctive relief is appropriate to prevent public officials and future grand juries from making use of the record developed by a grand jury investigation conducted for improper purposes); *United States* v. *Doe,* 455 F.2d 1270, 1274 (1st Cir. 1972) (denial of protective order against use of grand jury for improper purpose of collecting evidence to be used in proceeding in another district is appealable despite fact petitioner would have opportunity to challenge use of this evidence before the second tribunal). The Government's position might have some persuasiveness if AMPI was merely contending that disclosure is improper for lack of a Rule 6(e) showing of compelling need, but its objection goes beyond this in challenging the legitimacy of the commencement and conduct of the investigation.

The Government's attempt to analogize the order transferring grand jury materials to a 28 U.S.C. § 1404 (a) transfer order fails because a transfer under § 1404(a) does not terminate the proceeding, but merely results in a different forum for litigation involving the same parties and the same issues. On the other hand, the transfer order issued by Chief Judge Spears terminated an independent proceeding in which the only issue presented—whether the grand jury materials should be transferred—will not be at issue in the antitrust litigation pending in the Western District of Missouri. Moreover, the Government, the moving party in the instant transfer proceeding, is not even a party to the Missouri litigation, while several parties to that litigation did not take part in the transfer proceeding. Because of this clear independence between the transfer proceeding in Texas and the antitrust litigation in Missouri, a much closer analogy are those cases cited in the Petition holding that orders

granting or denying discovery in an independent discovery proceeding are final appealable orders under 28 U.S.C. § 1291. Petition at 18-19 and n.10.

III. The Orders Of February 19 And May 6, 1975 Are Final And Appealable Under 28 U.S.C. § 1291

The arguments by the Government and NFO in regard to the February 19 and May 6 Orders are fatally defective due to the failure to recognize that these orders, in denying AMPI's motions to stay the grand jury investigation, dealt directly with AMPI's allegations that the grand jury was improperly authorized and had been initiated for impermissible motives constituting an abuse of the grand jury process. The false assertion that these orders merely denied motions to quash a subpoena [4] results in the erroneous conclusion that AMPI's sole method of obtaining appellate review of these orders was to refuse to comply with the subpoena served upon it and place itself in contempt. Contempt has never been viewed as the sole method for appealing the denial of a challenge to a subpoena or to the propriety of a grand jury. *See, e.g., Cates* v. *LTV Aerospace Corp.*, 480 F.2d 620, 622 (5th Cir. 1973); *Covey Oil Co* v. *Continental Oil Co.*, 340 F.2d 993, 996-97 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965). A person can choose to comply with the subpoena and appeal at the end of the proceeding. While the Government cites cases holding that the denial of a motion to quash a subpoena is not appealable while the proceeding is pending, there is no case support for the proposition that the denial of such a motion may not be appealed at the conclusion of the proceeding. The Government's cases are inapposite to the instant proceeding because AMPI's motions were to stay the entire grand jury investigation on the grounds of unauthorized and improper use of the grand jury, not merely to quash a subpoena. The grand jury investigation would have

[4] Chief Judge Spears' Orders clearly indicate that AMPI's motions were primarily aimed at staying the entire grand jury investigation. *See* Pet. App. 20a-21a.

continued even if AMPI had refused to comply with the subpoena. Thus, AMPI's contentions about unauthorized and improper use of the grand jury could not have been subjected to appellate review in the method suggested by the Government and NFO.

The assertion that AMPI will not be irreparably harmed by the unavailability of appellate review at this time is equally untenable. In its recent decision in *Ealy* v. *Littlejohn*, 569 F.2d 219, 234 (5th Cir. 1978), the Fifth Circuit recognized that the target of an improperly motivated grand jury investigation is irreparably harmed by the continued existence of the grand jury transcript and report, even if the grand jury was terminated without bringing an indictment and no use is made of the materials in subsequent legal proceedings. *Ealy* held that injunctive relief should issue when a grand jury has been used for improper purposes so as to prevent the dissemination of the tainted grand jury materials.[5] As demonstrated *supra* at 3-4, there will be no subsequent opportunity for AMPI to obtain appellate review of these orders, and thus irreparable injury will result if the Fifth Circuit does not review AMPI's contentions on their merits at this time.

The Government's argument that the issues raised by these orders are now moot since the grand jury investigation has been terminated is likewise totally without merit. AMPI is now seeking expungement of the grand jury transcript and return of its documents, so as to place it in the same position as if the allegedly unauthorized and improperly motivated grand jury investigation had never been commenced. As the Fifth Circuit stated in *Ealy*, "There is certainly a live con-

[5] The plaintiffs in *Ealy* requested expungement of portions of the grand jury record. 569 F.2d at 224 and n.8. The Fifth Circuit held that the plaintiffs were entitled to injunctive relief, and remanded for determination of a specific remedy. *Id.* at 235.

troversy between the parties so long as the grand jury report and transcript, replete with offending portions, remain open to inspection by federal or state officers and future grand juries." 569 F.2d at 234.

IV. The November 4, 1976 Order, Granting Intervention To NFO, Is Also Appealable At This Time

The Opposition Briefs do not dispute the appealability of an order granting intervention pursuant to Fed.R. Civ. P. 24(a) once the proceeding has been concluded. The November 4, 1976 order is thus appealable since the transfer proceeding before Chief Judge Spears was independent of all other litigation and terminated with the order granting transfer. Significantly, in *State of Illinois* v. *Sarbaugh,* 552 F.2d 768, 772-73 (7th Cir.), *cert. denied,* 98 S. Ct. 262 (1977), the Seventh Circuit reviewed on the merits, without questioning finality, an order granting intervention in a proceeding seeking transfer and disclosure of grand jury materials for use in antitrust litigation pending in another district.

CONCLUSION

For the reasons set forth in the Petition and in this Reply Brief, the writ of certiorari should be granted.

Respectfully submitted,

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